Supreme Court, U. S.
FILED
JUL 17 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-92

FIRST NATIONAL BANK OF MEMPHIS,
Petitioner,

versus

LOUISE CRUM SMITH, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the Supreme Court of Arkansas

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FIRST NATIONAL BANK OF MEMPHIS,
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LOUISE CRUM SMITH, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the Supreme Court of Arkansas

The Petitioner, First National Bank of Memphis, respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the Supreme Court of Arkansas. Respondents herein are Louise Crum Smith, Ralph Crum, James Crum, Bates Sullivan, C. H. Sullivan, Jr., Louise Sullivan Jennings, Virginia Sullivan McDaniels, and the Estate of H. D. Torian, deceased.

OPINIONS BELOW

The Opinion of the Supreme Court of Arkansas, dated April 24, 1978, not yet reported, appears in the Appendix hereto (A-1-A-12).

The Opinion of the Crittenden County, Arkansas Probate Court, dated November 24, 1976, which is unreported, appears in the Appendix hereto (A-15-A-22).

The Opinion of the Supreme Court of Mississippi, dated November 3, 1975, reported at 321 So.2d 287, appears in the Appendix hereto (A-23-A-34).

The Opinion of the Chancery Court of DeSoto County, Mississippi, dated March 13, 1974, which is unreported, appears in the Appendix hereto (A-35-A-36).

JURISDICTION

The judgment of the Supreme Court of Arkansas, the Court of final jurisdiction in the State of Arkansas, was entered on May 11, 1978, and dated May 11, 1978 (A-13-A-14). Said judgment affirmed the decree of the Crittenden County, Arkansas Probate Court.

This petition for certiorari was filed within ninety (90) days of that date. The jursdiction of the Supreme Court of the United States is invoked pursuant to 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Whether the Arkansas Supreme Court was required to give full faith and credit to the entire decision of the Mississippi Supreme Court which had subject matter and in personam jurisdiction to determine whether Arkansas or Mississippi law would apply in allocating the burden of payment of state and federal death taxes between beneficiaries.

2. Is the Mississippi decree not entitled in its entirety to full faith and credit in Arkansas solely because of its effect on personal property not located in Mississippi, although the Mississippi court had in personam and subject matter jurisdiction?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article IV, § 1 of the Constitution of the United States and United States Code, Title 28, § 1738 are reproduced in the Appendix hereto (A-38-A-39).

STATEMENT OF THE CASE

The First National Bank of Memphis was appointed Executor of the Estate of Lula S. Torian in the States of Mississippi and Arkansas on November 3, 1972, and January 23, 1973, respectively. First National's obligation as executor in both states was to fully administer the estate and make proper distribution of the estate assets to the various beneficiaries. Mrs. Torian died a domiciliary of Arkansas but owned 920 acres of real property located in DeSoto County, Mississippi, which comprised over one-half of her total estate. Thus, it was necessary to institute probate proceedings in both Mississippi and Arkansas. The majority of Mrs. Torian's personal property was located in her bank lockbox at the First National Bank in Memphis, Tennessee.

There are two groups of beneficiaries under Mrs. Torian's will: the specific devisees of the 920 acres of Mississippi real property, all of whom are residents of Mississippi, and the residuary legatees, respondents herein, who received personal property under the residuary clause of Mrs. Torian's will, who are Tennessee residents except for one beneficiary who is a resident of Mississippi.

I. Mississippi Proceeding

After appointment of First National as Executor in both Arkansas and Mississippi, a proceeding was held in the Mississippi Chancery Court, the court of probate under Mississippi

law, in which the specific devisees sought a determination by the court of whether Arkansas or Mississippi law would apply to allocate the death tax burden between the beneficiaries. They further prayed for application of Mississippi law. The applicable common law of the State of Mississippi requires payment of death taxes entirely from the residuary of the decedent's estate. Arkansas law allocates the death tax burden proportionately among all beneficiaries (A-40).

The residuary legatees, although non-residents of Mississippi, and not subject to service of process therein, voluntarily appeared in the Mississippi proceeding, filed pleadings, and opposed the application of Mississippi law, seeking instead application by the Mississippi Chancery Court of the Arkansas statute. As stated by the residuary legatees' attorney, the purpose of the proceeding was to decide whether all the death taxes would be paid out of the residuary pursuant to Mississippi law or not. (R. 592). The Mississippi court therefore had in personam jurisdiction of all beneficiaries of the Torian estate including the residuary legatees, respondents herein, and subject matter jurisdiction arising out of the original probate of Mrs. Torian's will in Mississippi. This jurisdiction has not been disputed.

As executor of the Torian Estate in both states, First National appeared before the Mississippi court which had jurisdiction over First National as executor. First National did not seek to effect the court's choice of law, but in its pleadings did, however, make known to the Mississippi court its appointment as Arkansas executor and that it had determined that there was virtually no residuary estate located in Mississippi, the substantial portion being located in Memphis, Tennessee, primarily under the jurisdiction of the Arkansas court.

The record of the entire Arkansas proceeding appointing First National as executor in Arkansas was introduced as evi-

dence in the Mississippi proceeding (R. 496-527), by stipulation of counsel for all parties, including the residuary legatees.

After a full evidentiary hearing during which counsel for both groups of beneficiaries offered proof to support the application of one state's law over the other, the court ruled, based upon recognized conflict of law principles, that First National (the executor in both states) should apply the law of Mississippi in allocating the tax burden (A-35-A-37).

The residuary legatees timely filed and perfected an appeal to the Mississippi Supreme Court seeking reversal of the lower court's ruling and application of the Arkansas law as a matter of comity and based upon the decedent's domicile in Arkansas. The Mississippi Supreme Court rejected the contention of the residuary legatees that Arkansas law should apply and affirmed the decision of the lower court relying upon the holding of *Mazza v. Mazza*, 475 F.2d 385 (D.C. Cir. 1973). The basis for applying Mississippi law according to the Mississippi Supreme Court was that no Arkansas residents were involved (Mr. Torian having no interest at stake), and that Mississippi had the dominant interest in applying its laws using the "interest analysis approach". No review of the Mississippi Supreme Court's decision by petition for writ of certiorari to this Court was sought by the residuary legatees.

Payment of all death taxes due in connection with the administration of the estate was made in accordance with the Mississippi decree by First National.

II. How Federal Question Is Present?—The Arkansas Proceeding.

Subsequent to the Mississippi proceeding, in April, 1976, First National filed an accounting with the Arkansas Probate Court which reflected payment of the death taxes from the

residuary assets of the estate as ordered by the Mississippi court and in conformity with Mississippi law. The residuary legatees objected to the accounting and requested that the Arkansas Court order First National to (1) reimburse the residue $228,-543.22 for death taxes charged thereto pursuant to the Mississippi decree and paid from the residuary estate, and (2) apply Arkansas law to the allocation of the burden of payment of death taxes. In short, the residuary legatees sought a second determination of the issue which they had unsuccessfully litigated previously before the Mississippi courts.[1]

First National specially set up and claimed application to the Mississippi decree of res judicata and full faith and credit as set forth in Article IV, § 1 of the Constitution of the United States and 28 U.S.C. § 1783. The pleadings and briefs submitted to the Probate Court of Arkansas prior to the hearing of the petition of the residuary legatees refer repeatedly to these federal rights. (R.57-65, 69-74 and A-41-A-46) Authenticated copies of all Opinions and Decrees entered by the Mississippi courts, as well as the entire transcript and record of the Mississippi lower court proceeding, were filed with the Arkansas probate court as provided by 28 U.S.C. § 1783. (R.57-65, 69-74, 401-610).

The specific devisees of the Mississippi realty did not appear in the Arkansas proceeding at any time.

The Arkansas court in its opinion specifically declined to give full faith and credit and res judicata effect to the Mississippi decree as it affected any property not located within the State of Mississippi. (A-19-A-20). The relief sought by the residuary legatees was granted and the death tax credit disallowed, requiring First National to reimburse the residuary estate some $229,000.00.

[1] The residuary legatees also objected to several other items contained in the accounting filed by First National which are not material to the issues raised in this Petition.

First National timely appealed the decision to the Arkansas Supreme Court, the state's highest court, and claimed and specially set up as error the refusal of the lower Arkansas court to give full faith and credit and res judicata effect to the Mississippi decree. The Arkansas Supreme Court considered the constitutional issues and ruled thereon, stating:

> "Here we are of the view that the Mississippi court decision was not entitled to full faith and credit in its entirety because the court lacked jurisdiction over the Arkansas *res* or that portion of the estate which Arkansas had acquired jurisdiction." (A-6).

This holding was made in spite of the Mississippi court's in personam jurisdiction over all interested parties, including First National as Executor, and subject matter jurisdiction arising out of the original probate of Mrs. Torian's will in the State of Mississippi.

The court reasoned that the Mississippi decree was not entitled to full faith and credit to effect personal property that was not situated in Mississippi and over which the Mississippi court did not have in rem jurisdiction. The Court then reasoned, incorrectly, relying upon *Carpenter v. Strange*, 141 U.S. 87, 11 S.Ct. 960 (1891); *Baker v. Baker, Eccles & Co.*, 242 U.S. 394, 37 S.Ct. 152 (1917); and *Hanson v. Denckla*, 357 U.S. 235, 78 S.Ct. 1228 (1950); that the existence of in personam jurisdiction over all interested beneficiaries and the executor "does not entitle the Mississippi judgment to full faith and credit in Arkansas as to the Arkansas assets." (A-7).

The Court apparently viewed the Mississippi proceeding strictly as an in rem proceeding which, of course, it was not, as all of the residuary legatees personally appeared, tried the suit and appealed the decision.

From the final determination of the Arkansas Supreme Court, First National has petitioned this Court for a review of the denial of a federal right.

REASONS THE WRIT SHOULD BE GRANTED

This petition presents questions of extreme public importance involving the application of the full faith and credit clause and the doctrine of res judicata. In this case, the Arkansas Supreme Court has decided a substantial federal question in disregard of prior rulings of this Court and has effectively altered the parameters of the full faith and credit clause as previously enunciated by this Court. In short, there exist compelling reasons for granting this writ.

1. The Decision Below Conflicts With Decisions of This Court as to the Applicability of Full Faith and Credit and Res Judicata to Judgments of Sister States.

Contrary to the decisions of this Court, the Arkansas Supreme Court has declared that the judgment of a sister state is not entitled to full faith and credit nor does it have res judicata application if the judgment operates to effect, directly or indirectly, property not within the jurisdiction of the sister state regardless of the existence of subject matter and in personam jurisdiction. *Milwaukee County v. M. E. White Co.*, 296 U.S. 268, 56 S.Ct. 229 (1935); *Milliken v. Meyer*, 311 U.S. 457, 61 S.Ct. 339 (1941); and *Morris v. Jones*, 329 U.S. 545, 67 S.Ct. 451 (1947). The Arkansas Supreme Court granted "full faith and credit" to the Mississippi judgment only to the extent it affected property located in the State of Mississippi and over which the Mississippi Court had in rem jurisdiction. Such a limited application only requires "some" faith and credit be given to a foreign government as opposed to the mandated "full" faith and credit. *Davis v. Davis*, 305 U.S. 32, 40, 59 S.Ct. 3, 6 (1938).

The Arkansas Supreme Court stated its limited application of the full faith and credit clause as follows:

> "However, *personal jurisdiction over the parties and litigation of this issue* does not entitle the Mississippi judgment to full faith and credit in Arkansas as to the Arkansas assets." (Emphasis supplied) (A-7).

The Mississippi decree, by its terms, did not operate only as an in rem judgment against property but was a determination in personam involving the law to be applied to the administration of the estate. No direct or indirect control was exerted over the personal property, the Mississippi decree ordering the Executor, First National, to apply Mississippi law in connection with allocation of the tax burden. Nevertheless, the Arkansas Supreme Court ignored the in personam effect of the judgment and stated:

> "The Mississippi judgment was entitled to full faith and credit in Arkansas as far as it concerned property in Mississippi, but it had no effect in rem upon property legally situated in Arkansas. Accordingly, it was not entitled to full faith and credit nor res judicata effect on the issue of allocation of tax liabilities in regard to the assets of the Arkansas state." (A-8).

The decision of the Arkansas Supreme Court ignores previous pronouncements of this Court and applies an unwarranted construction to the federal right encompassed in the full faith and credit clause. Further, the doctrine of res judicata which has been held by this Court to be encompassed in Article IV, §1 was likewise limited. *Riley v. New York Trust Company*, 315 U.S. 343, 62 S.Ct. 608 (1942). This Court has on numerous occasions stated that one trial of an issue is enough and that once a matter has been fully litigated and judicially determined it cannot be retried in another state in litigation between the same parties. *Baldwin v. Iowa State Traveling Men's Association*, 283 U.S. 522, 51 S.Ct. 517 (1931); *Stoll v. Gottlieb*, 305 U.S. 165, 59 S.Ct. 134 (1938); *Treinies v. Sunshine Mining Co.*, 308 U.S. 66, 60 S.Ct. 44 (1939); and *Durfee v. Duke*, 375 U.S. 106, 84 S.Ct. 242 (1963). Such a determination is

conclusive upon the merits of the controversy and cannot be collaterally attacked where jurisdiction of the subject matter and of the parties is present. *Great Western Telegraph Co. v. Purdy*, 162 U.S. 329, 16 S.Ct. 810 (1896); and *Riley v. New York Trust Co., supra.* However, the holding of the Arkansas Supreme Court disregards the Constitutional command of the full faith and credit clause as interpreted by this Court and limits the effect of any foreign judgment in the State of Arkansas.

Often the interest and policy of the state rendering the judgment will override the interest and policy of the state where the judgment is sought application. *Fauntleroy v. Lum*, 210 U.S. 230, 28 S.Ct. 641 (1908); *Yarborough v. Yarborough*, 290 U.S. 202, 54 S.Ct. 181 (1933); and *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 64 S.Ct. 208 (1943). There can be no doubt that the application of full faith and credit to judgments of sister states will have effect beyond the confines of the state rendering the judgment. This is specifically the intended purpose of the full faith and credit clause; to give effect in all states to the judgment of a sister state when obtained consistent with due process safeguards. *Baker v. Baker, Eccles & Co., supra,* and *Magnolia Petroleum Co. v. Bunt, supra.*

The Arkansas Supreme Court, however, determined that the indirect effect of the Mississippi decree upon personal property outside of Mississippi actually located in Tennessee was sufficient cause alone to deny full faith and credit to the Mississippi decree, incorrectly citing *Baker v. Baker, Eccles & Co., supra,* as supportive of this conclusion. This Court has in no case applied such a construction to the full faith and credit clause.[2]

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[2] Most recently in *Shaffer v. Heitner*, — U.S. —, 97 S.Ct. 2569 (1977), this Court stated,

> . . . Similarly, if the defendant consented to the jurisdiction of the state courts or was personally served within the State, a judgment could affect his interest in property outside the State.

Id. at 2577.

To the contrary, in *Baker* this Court noted that while a foreign judgment is not entitled to full faith and credit when the judgment operates "in rem" against foreign probate assets, an in personam judgment can operate extraterritorially to effect personal property because of jurisdiction over the parties bound by the judgment. This Court stated the opportunity to be heard by the person bound by the judgment was the significant prerequisite to granting full faith and credit to a foreign judgment, not the location of the property that may be affected.

This Court further acknowledged in *Baker* that in personam jurisdiction is perhaps the only means of obtaining a judgment entitled to full faith and credit in cases where estate assets and beneficiaries are located in several states. The Court stated:

> "Assuming a lawful grant of administration in each state wherein part of the personalty is located and some of the possible distributees reside, how, it is asked, is any one of these administrators, or any one of the claimants of a share in the whole estate, to have the place of the intestate's domicile settled authoritatively and the lawful distributees ascertained. The answer is clear: Unless all possible distributees can be brought within the jurisdiction of a single Court having authority to pass upon the subject matter either by service of process or by their voluntary appearance, it must in many cases be impossible to have a single controlling decision upon the question."
>
> At pp. 404-405, 393.

The problem specifically faced in *Baker* of which state can tax the intangibles of an estate was apparently resolved by this Court in *First National Bank of Boston v. Maine*, 284 U.S. 312, 328-330, 52 S.Ct. 174, 177-178 (1932). Even so, *Baker* still stands for the proposition that in personam jurisdiction is sometimes the only method of resolving disputes of beneficiaries of several states where assets are located in more than one jurisdiction.

This Court in *Baker v. Baker, Eccles & Co., supra,* and *Hanson v. Denckla,* 357 U.S. 235, 246, 78 S.Ct. 1228, 1235 (1958), did not reject full faith and credit application because of the absence of in rem jurisdiction over property affected as stated by the Arkansas Supreme Court. To the contrary, this Court in both cases recognized and acknowledged in personam jurisdiction as satisfying due process requirements for application of full faith and credit to foreign judgments.

The significant factors in determining whether application of full faith and credit is proper are based upon due process considerations—the opportunity to be heard—and not the effect of the judgment extraterritorially or the lack of in rem jurisdiction over property indirectly affected. *Riley v. New York Trust Company,* 315 U.S. 343, 353, 62 S.Ct. 609, 614 (1942).

In addressing directly the significance of in personam jurisdiction, the Arkansas Supreme Court incorrectly cites *Carpenter v. Strange,* 141 U.S. 87, 11 S.Ct. 960 (1891), to support its conclusion that in personam jurisdiction of all interested parties does not require that a foreign judgment be given full faith and credit where it affects property outside of the rendering state's jurisdiction. The holding in *Carpenter* does not support the Arkansas Supreme Court's denial of full faith and credit in the instant case, but rather acknowledges the ability of courts to affect even real property by virtue of in personam jurisdiction over its owner or in rem jurisdiction over the property itself, both types of jurisdiction being sufficient to support granting of full faith and credit.

Support for this application of the full faith and credit clause is also found in Leflar, *American Conflicts Law,* §201 (E.D., 1968), where it is stated:

> "Parties who are before a court that has jurisdiction over them ought to be completely bound by that court's adjudication of issues there litigated by them, regardless of whether the court had power to act in rem against the out-of-state things to which the litigation related. It is only when the present litigants were not before the court in the prior proceedings that the situs court should be free to disregard the prior sister state's adjudication."

It is noteworthy that the Arkansas decree, however, does attempt to effect the rights of the Mississippi devisees and their Mississippi property by requiring the Executor to allocate a portion of the death tax burden to them. The Arkansas Probate Court, of course, had neither in rem jurisdiction over the Mississippi property nor in personam jurisdiction of the Mississippi devisees, but nevertheless, entered a decree applicable to the Mississippi devisees and their property. Such action by the Arkansas Court is clearly contrary to the holding of *Baker v. Baker, Eccles & Co., supra.*

The Arkansas Supreme Court completely misinterprets this Court's previous rulings in both *Carpenter v. Strange, supra,* and *Baker v. Baker, Eccles & Co., supra,* and ignores its own opinion in *State v. Wright,* 109 S.W.2d 123 (Ark. 1937), in denying full faith and credit and res judicata effect to the decree of the Mississippi court. In so ruling the Arkansas Supreme Court is in direct conflict with the decisions of this Court recognizing the application of full faith and credit to judgments obtained by virtue of in personam jurisdiction over interested parties.

2. **The Arkansas Supreme Court by Its Decision Seeks to Limit the Application of the Full Faith and Credit Clause and Such Limitation Is Reviewable by the Supreme Court and Calls for Exercise of This Court's Supervisory Power.**

In refusing to give full faith and credit to the Mississippi decree the Arkansas Supreme Court has denied First National a federal right. Repeatedly, this Court has viewed such a denial by a state's highest court to be a compelling reason for

review of the decision. *Matthews v. Huwe*, 269 U.S. 262, 46 S.Ct. 108 (1925); *Tumey v. Ohio*, 273 U.S. 510, 515, 47 S.Ct. 437, 438 (1927), and *Titus v. Wallick*, 306 U.S. 282, 69 S.Ct. 557 (1939). In exercising such a review, the sufficiency of the state court's grounds for denial or limitation have been subject to the approval of this Court in order to preserve and protect federal rights. *Huntington v. Attrill*, 146 U.S. 657, 684, 13 S.Ct. 224, 234 (1892); *Kansas City Southern R. Co. v. C. H. Albers Commission Co.*, 223 U.S. 573, 593, 32 S.Ct. 316 (1912); and *Titus v. Wallick*, 306 U.S. 282, 291, 59 S. Ct. 557, 562 (1939). When full faith and credit has been denied, this Court has likewise exercised supervision of the state court's action because of the clear public interest involved in a denial of full faith and credit. *Titus v. Wallick, supra.*

In the instant case, the Arkansas Supreme Court has denied full faith and credit to the decree of a Mississippi Court in order to advance the interest and policy of the State of Arkansas, a basis for denial of full faith and credit which this Court has previously rejected. *Morris v. Jones*, 329 U.S. 545, 553, 67 S.Ct. 451, 457 (1947). To prevent denials of full faith and credit for such reasons and to insure the ongoing national policy of jurisprudence contained in the full faith and credit clause throughout the several states, this Court is the final arbiter of questions arising concerning application of the full faith and credit clause. *Williams v. State of North Carolina*, 317 U.S. 287, 302, 63 S.Ct. 207, 215 (1942). As stated in *Pacific Employer's Insurance Co. v. Industrial Accident Commission of California*, 206 U.S. 493, 502, 59 S.Ct. 629, 633 (1939):

> "This Court must determine for itself how far the full faith and credit clause compels the qualification or denial of rights asserted under the laws of one state, that of the forum, by the statutes of another state."

Since the Arkansas Supreme Court does not have the authority under the Constitution to determine the limits of the full faith

and credit clause it is necessary for this Court to review the Arkansas Supreme Court decision.

The limitation announced by the Arkansas Supreme Court results in the full faith and credit clause and the statute adopted in furtherance of it having no application where its need is greatest, that is, where there is a clash of interests and policies between states. See *Morris v. Jones, supra.* The approach taken by the Arkansas Supreme Court is to deny application to any judgment sought to be given recognition if that judgment affects even indirectly property not located in the foreign state in a manner inconsistent with Arkansas law or policy. Such an interpretation severely limits the proper functioning of the full faith and credit clause and permits each state to ignore judgments of sister states in those cases where full faith and credit will most likely be sought.

While the basis of the Arkansas Supreme Court's denial of full faith and credit does not come within the limitations recognized by this Court, this Court has in the past set forth certain exceptions to its application. *Griffin v. McCoach*, 313 U.S. 498, 61 S.Ct. 1023 (1941). These exceptions are few and have been limited to particular circumstances requiring special consideration. If, however, the instant case presents factors which call for limitation of the full faith and credit clause, such a limitation can only be declared by this Court. Regardless of whether such an exception is proper in the instant case, absent review by this Court the Arkansas decision will have the effect of an exception in the State of Arkansas and perhaps in other states. The effect of the Arkansas decision upon application of the full faith and credit clause will be significant in the absence of the exercise of this Court's supervisory power.

Based upon prior decisions of this Court it would appear that a denial and limitation of full faith and credit in the instant case is not proper.

3. **The Public Interest Requires That Estate Administration Be Orderly and Free From Lengthy and Costly Jurisdictional Disputes.**

Because of the prevalence in present day society of the movement of property and people from state to state with little or no regard to state lines, multistate probate of estates is increasing. In each such probate the question of which state law is to apply with respect to various issues involving the administration of the estate often results, as in the instant case, in multiple court proceedings in various states. The problems attendant to these conflict of law questions and the resulting difficulty faced by administrators, executors, beneficiaries, and courts have been the subject of a significant amount of legal research and comment as well as litigation. See Ester & Scoles, *Estate Planning and Conflict of Laws*, 24 Ohio St.L.J. 270 (1963); Scoles, *Apportionment of Federal Estate Taxes and Conflict of Laws*, 55 Col.L.Rev. 261 (1955); and Moore, *Estate Administration and the Conflict of Laws*, 35 Va.L.Rev. 316 (1949) and cases cited therein.

Commentators as well as the courts have agreed that in multistate probate proceedings the public interest requires a degree of predictability of result and the orderly administration of the estate without protracted and expensive jurisdictional litigation. The proper application of the full faith and credit clause in those cases, where possible, advances these policies and the interest of the public at large.

In the area of the collection of federal estate taxes this Court held in *Riggs v. Del Drago*, 317 U.S. 95, 63 S.Ct. 109 (1942), that the allocation of the ultimate burden of the federal estate tax among beneficiaries had been left to the states by Congress and that therefore each state was free to adopt its own method of allocation. Approximately one-half of the states by statute or judicial decree have adopted a method of proration of the

tax burden between all beneficiaries similar to the Arkansas statute. Other states have codified or continued use of the common law approach of satisfying all death tax liability from the residuary assets of the estate similar to the Mississippi common law. As a result when assets are located in two or more states confusion, delay and additional expense results from determining the proper method of allocating the Federal estate tax burden in several forums. This problem is separate and apart from the problem oftentimes faced in determining in which state the decedent was domiciled and which state can tax the decedent's personal property. *California v. Texas*, 46 U.S.L.W. 4795 (June 22, 1978). In some cases the difficulties associated with multistate probate cannot be avoided as recognized by this Court previously. See *Klaxon Company v. Stentor Electric Manufacturing Co.*, 313 U.S. 487, 61 S.Ct. 1020 (1948). However, in those cases where federal law applies to command recognition by all states of a sister state's decision regarding tax allocation or estate administration the public is entitled to the system's full protection to avoid the disagreeable consequences resulting from repeated litigation. The utilization and application of the full faith and credit clause as well as the due process clause promotes the interests of the public referred to above which conform in large measure to the purposes of these constitutional rights.

The applicability of the full faith and credit clause in such cases should not be limited or denied as in the present case. Such limitation results in protracted litigation and uncertainty of results, all to the detriment of the public and the orderly administration of estates.

The holding of the instant case encourages the relitigation of issues once decided and results in delay in resolving disputes involving the administration of estates. Those beneficiaries disappointed with the result obtained in one state will be encouraged to relitigate issues concerning taxation and administra-

tion in forums with state laws or policies more favorable to their interests. In cases where an estate has assets located in numerous states, realization of the maxim "one trial of an issue is enough" would be unlikely.

Elimination of the problems raised by conflicts in the law and policy of the various states regarding taxation of estates is not possible absent federal legislation or enactment by all states of uniform taxation statutes. However, the public is entitled to application of constitutional safeguards and rights by the courts when circumstances justify their application in order to minimize the burdens and problems faced in multistate probate. The instant case denies that degree of judicial uniformity guaranteed by the full faith and credit clause and encourages the denial of full faith and credit to all judgments based upon the law of sister states when inconsistent with that of the forum.

CONCLUSION

The Arkansas Supreme Court decision is contrary to the decisions of this Court and the purposes of the full faith and credit clause and the statute enacted pursuant thereto by Congress. The decision ignores the significance of in personam jurisdiction to bind parties and effectuate full faith and credit application. This Court has repeatedly recognized the sufficiency of in personam jurisdiction to bind parties.

The denial of this federal right discourages the orderly administration of estates and is adverse to the public interest. For these reasons, the writ of certiorari should issue to review the judgment and opinion of the Arkansas Supreme Court, and this Court should reverse and remand the instant case to the Arkansas Supreme Court for entry of an opinion and judgment consistent with this Court's rulings in *Hanson v. Denckla, supra, Baker v. Baker, Eccles & Co., supra,* and *Morris v. Jones, supra.*

Respectfully submitted,

BEN C. ADAMS

FRIERSON M. GRAVES, JR.

JOHN C. SPEER

HEISKELL, DONELSON, ADAMS,
WILLIAMS & KIRSCH
2020 First Tennessee Building
Memphis, Tennessee 38103

Certificate of Service

I hereby certify that on this 13th day of July, 1978, three copies of the petition for writ of certiorari were mailed, postage prepaid, to John S. Porter, 130 North Court Street, Memphis, Tennessee 38103, Elton Rieves, III, P.O. Box 237, West Memphis, Arkansas 72301, and J. H. Spears, P.O. Box 769, West Memphis, Arkansas 72301, Counsel for Respondents. I further certify that all parties required to be served have been served.

John C. Speer
2020 First Tennessee Building
Memphis, Tennessee 38103
Counsel for Petitioner

APPENDIX

APPENDIX 1

Supreme Court of Arkansas

No. 77-283

Opinion Delivered April 24, 1978

In the Matter of the Estate of Lula S. Torian, Deceased and the First National Bank of Memphis, Memphis, Tennessee, Appellant v. Louise Crum Smith, et al., Appellees	Appeal from Crittenden Probate Court, Henry Wilson, Judge Affirmed on direct appeal Affirmed on cross-appeal

Frank Holt, Associate Justice

This appeal results from a conflict of laws with respect to the apportionment and payment of estate taxes. The decedent Lula S. Torian, age 81, died testate on October 24, 1972, while a resident and domiciled in Arkansas. She was survived by her husband, H. D. Torian. Her will, executed in Mississippi, nominated the appellant, First National Bank of Memphis, to be executor of her estate. The will made no provision as to how the inheritance taxes were to be paid by her estate. The named executor filed a petition in a Mississippi State court on November 3, 1972, to probate the original will and codicils there. The petition alleged that, although the testatrix was a citizen and resident of Crittenden County, Arkansas, she owned no real property in Arkansas and, because she owned approximately 900

acres of land (later valued at $1,000 per acre for tax purposes) in DeSoto County, Mississippi probate of the will there was necessary and desirable. The petition was granted on the date it was filed and the appellant bank appointed executor. On December 7, 1972, the executor bank filed an inventory of the estate, listing personal property in Mississippi valued at $1,000. It appears the real and personal property located in Mississippi consisted of approximately 59% of the total estate.

On January 23, 1973, the executor filed a petition, which was approved that date, to probate the will in Crittenden County, Arkansas. Attached to the petition was an authenticated copy of her will and codicils together with the Mississippi order admitting the will to probate there. It was requested that the assets of the estate in Mississippi be administered according to the laws in Mississippi and the personal property in Arkansas, valued at approximately $486,000, be administered according to the laws of Arkansas. Letters testamentary were issued to appellant First National appointing it executor of decedent's Arkansas estate which was found to consist of personal property valued as stated. The Arkansas probate court further found that it was necessary to probate the will in Arkansas and Mississippi to fully administer the estate and make a proper distribution of the property. The order stated that the assets in Arkansas would be administered according to Arkansas law and those in Mississippi under its law. It appears that the assets in Arkansas comprised approximately 41% of the total estate.

On May 9, 1973, appellant First National filed a petition with the Arkansas court requesting postponement of the filing of an inventory since a question had arisen as to the proper forum for original jurisdiction to probate the will. The court postponed the filing of an inventory until this determination was made. On July 26, 1973, appellant First National, upon advice of its Mississippi counsel, filed a petition with the Mississippi court for permission to withdraw the original will and transfer it to

Arkansas. The petition recited that the decedent owned about 920 acres in DeSoto County, Mississippi, and a residence in West Memphis, Arkansas, with her husband as tenants by the entirety; that an authenticated copy of the will, previously admitted to probate in Mississippi, was afterwards probated in the probate court of Crittenden County, Arkansas; and that the appellant is advised there is some question about the validity of a probate of a will of an Arkansas resident by an authenticated copy rather than by the original. Further, a transfer of the original will was requested for the reason that the decedent's will and codicils recite that she was a resident of Arkansas at the time of her demise in Arkansas, and she was married to an Arkansas resident and resided with him on property jointly owned by them in Arkansas. The several specific or residuary legatees (Tennessee residents except one), the appellees hare, and the specific devisees of the 920 acres in Mississippi (Mississippi residents) were made respondents. The executor requested that process issue requiring respondents to show cause why the original will should not be withdrawn from the Mississippi court for the purpose of filing it in the pending proceeding in the Arkansas probate court. The residuary legatees answered and joined in the executor's petition. The specific devisees of the Mississippi lands answered controverting the petition to withdraw the original will.

By cross-bill against the executor, the specific devisees of the 920 acres sought an accounting and the payment of the federal estate taxes by allocating the burden of the taxes pursuant to the laws of Mississippi. The appellant executor, the only named party in the cross-bill, answered admitting federal estate taxes would be owed; also there was a controversy over which state law applied to determine proration of the estate tax liability; and since the decedent was an Arkansas resident, the Arkansas court should first determine the estate tax liability of the respective parties.

The Mississippi court denied the petition to withdraw and transfer the original will for filing in Arkansas. Further, it determined that the decedent's will, pursuant to Mississippi law, should be construed to require the payment of all estate taxes and other liabilities and expenses from the residuary estate. The residuary legatees (the appellees here), feeling aggrieved by the decree, appealed the decision to the Mississippi Supreme Court asserting that although the Mississippi court had jurisdiction to probate the will, it should have deferred jurisdiction to the Arkansas court, as a matter of comity, on the issue of who should bear the tax burden or should have applied Arkansas law. Under Ark. Stat. Ann. § 63-150 (Repl. 1971), the tax liability would be apportioned equally among all beneficiaries of the estate. On November 3, 1975, the Mississippi Supreme Court affirmed the lower court's finding that it is not required by comity to defer to the Arkansas court or apply the Arkansas apportionment statute on the issue of who bore the tax liability because the forum state (Mississippi) and not the domiciliary state (Arkansas) had the greater substantial interest in the controversy under the "dominant interest" and "interest analysis approach." Also the will was not probated in Mississippi by mistake nor compulsion. Therefore, the residuary legatees must bear the burden of all estate taxes and expenses.

Thereafter, in April, 1976, the residuary legatees, appellees here, filed a petition in the pending proceeding, which had been held in abeyance, in the Arkansas probate court requesting an order directing the appellant executor to file its inventory and final accounting in the Arkansas court. The executor filed its accounting which indicated that the Arkansas administration had approximately $496,626.29 at its inception consisting of cash, bonds, securities, etc. Credits were claimed against those assets of the estate in Crittenden County, Arkansas, for the amounts that the executor had paid for federal, Mississippi and Arkansas estate taxes following the decision of the Mississippi Supreme Court. Appellees objected to the accounting asserting

that they, as residuary legatees, had been wrongfully charged in the sum of approximately $228,000; i.e., the executor had not apportioned the taxes pursuant to Arkansas law. Appellant executor asserted that since the residuary beneficiaries, appellees, were parties to the Mississippi proceedings or the appeal there, that the Mississippi Supreme Court decision was entitled to full faith and credit, and the question of the propriety of the expenditures for taxes was *res judicata* in the case.

The Arkansas probate court held that appellant First National, in its capacity as executor of the deceased's Arkansas estate, was not a party to the Mississippi proceeding and, therefore, neither the executor nor the Arkansas estate was subject to the decision rendered in Mississippi. The court commented that the record of the Mississippi proceeding did not disclose that the residuary legatees, appellees, were ever served with or waived process on the cross-bill but reasoned this fact was unimportant in that the Mississippi court only had jurisdiction of appellant First National as executor of the Mississippi estate, and the decree was entitled to full faith and credit only as to disposition of the Mississippi estate. Accordingly, the Arkansas probate court denied credits totaling $229,114.34, which were claimed by the executor, for the disbursements it had made, pursuant to Mississippi law, from the Arkansas assets in payment of the entire estate tax liability without the Arkansas court's approval. The Arkansas court also ordered the disbursement of the assets of the Arkansas estate to the objecting legatees, appellees, according to the Arkansas apportionment law. The court awarded the executor a fee of $4,000 for its services and its counsel a fee of $5,000.

On appeal here, the appellant executor first contends the court erred in failing to hold the entire decision of the Supreme Court of Mississippi was entitled to full faith and credit and that the doctrine of *res judicata* applied to the issue of the allocation of the estate tax liability. It is well settled that un-

der the full faith and credit clause of the United States Constitution, Art. IV, §1, a foreign judgment is conclusive on collateral attack, except for the defenses of fraud in the procurement of the judgment or want of jurisdiction in the court rendering it. *Purser v. Corpus Christi State National Bank*, 256 Ark. 452, 508 S.W.2d 549 (1974). Here we are of the view that the Mississippi court decision was not entitled to full faith and credit in its entirety because the court lacked jurisdiction over the Arkansas *res* or that portion of the estate of which Arkansas had acquired jurisdiction.

In *Simmons v. Simmons*, 203 Ark. 566, 158 S.W.2d 42 (1942), we held that "the situs of personal property is the residence of the owner" and the property located in this state is "not subject to the foreign jurisdiction." Further, it is the general rule of law adopted from the common law that the personal estate of a "decedent is a legal unit, having its *situs* at the owner's domicile," and "the title to the whole of it, wherever situate, is vested in the duly qualified domiciliary administrator, and not in the distributees, and that its distribution is governed by the law of the domicile of the deceased owner." *Baker v. Baker, Eccles & Company*, 242 U.S. 394 (1917). Here the deceased was a resident and domiciliary of Arkansas. Therefore, the personal property, approximating $500,000 in stocks, bonds, cash, etc., physically located in the appellant bank in Memphis, Tennessee, had its legal situs in Arkansas.

In Leflar, American Conflicts of Law, § 205 (3rd Ed. 1977), it is stated: "Tangible personalty is for the most part subject to administration at the place of its situs, and nowhere else." Further it is also said:

> Once a chattel is properly subjected to administration in any state, it is technically owned by the administrator there, for purposes of administration . . . If, however, the chattels have already come under the control of an administrator at their original situs, . . . the situs administrator's claim to the chattel is superior.

Here it appears that the Mississippi court never attempted to take control over the personal property located in Memphis. The executor filed an inventory and appraisement of the decedent's personal property with the Mississippi court which only listed "furniture and furnishing located in DeSoto County, Mississippi," valued at approximately $1,000. The first court to assert jurisdiction over the personalty in the Tennessee bank was the Arkansas court in its probate order on January 23, 1973. This was proper and in accord with the recited rule of law that the situs of personal property is at the residence or domicile of the owner. Further, *in rem* jurisdiction is founded upon physical power and the "basis of the jurisdiction is the presence of the subject property within the territorial jurisdiction of the forum State." *Hanson v. Denckla*, 357 U.S. 235 (1958). Therefore, the Mississippi State court lacked *in rem* jurisdiction over the Arkansas assets of the estate.

Even so, appellant contends by virtue of its personal jurisdiction over the parties, the Mississippi court's judgment is entitled to full faith and credit. Here it is argued that the Mississippi court had personal jurisdiction over the parties, including the appellees who by their appearance and appeal of the Mississippi trial court's decision, submitted themselves to the Mississippi Court's jurisdiction. As appellant argues, the basic question litigated there was what law should apply to determine the allocation of liability from the estate's assets for estate taxes. However, personal jurisdiction over the parties and litigation of this issue does not entitle the Mississippi judgment to full faith and credit in Arkansas as to the Arkansas assets. As was stated in *Carpenter v. Strange*, 141 U.S. 87 (1891):

> Hence, although in cases of trust, of contract and of fraud, the jurisdiction of a court of chancery may be sustained over the person, notwithstanding lands not within the jurisdiction may be affected by the decree, *(Massie v. Watts*, 6 Cranch, 148,) yet it does not follow that such a decree is in itself necessarily binding upon the courts of

> the State where the land is situated. To declare the deed to Mrs. Strange null and void, in virtue alone of the decree in New York, would be to attribute to that decree the force and effect of a judgment *in rem* by a court having no jurisdiction over the *res*.

Here, although personal property is involved rather than real property as in *Carpenter, supra,* the question of power to render a binding judgment over the property is analogous.

Here the Mississippi State court ruled that the will was properly admitted to probate in Mississippi and that its laws would determine who should bear the burden of the estate taxes. The Mississippi Supreme Court affirmed, recognizing the general rule that the final distribution of a decedent's effects is to be decided by the law of his domicile; however, it did not apply in Mississippi because of its statute "declaring that personal property situated in this State shall descend and be distributed according to the laws of this State, notwithstanding the domicile of deceased may have been in another State." Here the personalty involved was not situated in Mississippi. The Mississippi judgment was entitled to full faith and credit in Arkansas as far as it concerned property in Mississippi, but it had no effect *in rem* upon the property legally situated in Arkansas. Accordingly, it was not entitled to full faith and credit nor *res judicata* effect on the issue of allocation of tax liability in regard to the assets of the Arkansas estate.

Appellant contends the court erred in applying the Arkansas estate tax apportionment statute to Mississippi real estate because it was without jurisdiction to do so. Suffice it to say that the Arkansas Probate Court recognized that it had "no control or interest in the Mississippi proceedings." It merely denied the executor the credits sought for the payment of the entire estate tax liabilities out of the Arkansas estate.

Appellant next asserts the court abused its discretion in awarding an unreasonably low fee ($4,000) to it. Appellate

review of probate cases is *de novo,* as in equity cases, and on appeal we will consider improperly excluded evidence. *Price v. Price,* 258 Ark. 363, 527 S.W.2d 322 (1975). Therefore, before reaching appellant's contention, we first determine whether the exclusion of an attorney's testimony on the ground of attorney-client privilege was improper.

Here the executor, in its petition for allowance of executor's and attorneys' fees, asserted that the attorney Spears had been employed initially to render services for the Arkansas estate proceedings. The proffered testimony of Spears by appellees related to a consultation which took place a few days before the will was first filed for probate in Mississippi by appellant. According to this attorney, he had advised the appellant that Arkansas and not Mississippi was the proper forum to probate the will. Also, that probating the will in Mississippi would result in exhausting the residuary estate and the devisees of the Mississippi lands would be free of taxes "with a million dollars worth of land."

In *Francis v. Turner,* 188 Ark. 158, 67 S.W.2d 211 (1933), we stated that it was a settled principle "that an attorney for an estate represents the heirs and distributees and legatees" . . . and is in "a position of trust with respect to all those interested in the estate." An executor or administrator is in a similar position of trust with regard to all those interested in the estate. *Hobbs v. Cobb,* 232 Ark. 594, 339 S.W.2d 318 (1960). Here the appellant executor, in consulting with the attorney Spears, was necessarily acting for both itself as executor and for the beneficiaries under the will.

In regard to the attorney-client privilege, Ark. Stat. Ann. § 28-1001, Rule 502 (3) (Noncum. Supp., 1976), provides:

> (d) Exceptions. There is no privilege under this rule.
>
> (5) Joint clients. As to a communication relevant to a matter of common interest between or among two [2]

> or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between or among any of the clients. . . .

In a similar situation involving a shareholder's derivative suit against a corporation, the corporation's claim of privilege regarding the advice given it by its attorney was said not to be privileged from disclosure in the action. *Garner v. Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970). Here the fee sought by the executor was to be paid out of the estate. We are of the opinion the attorney-client privilege was inapplicable and the testimony admissible on the issue of the reasonableness of the executor's fee.

Appellant argues with respect to its executor's fee that, based upon the value of the personal property passing through its hands in the State of Arkansas and the problems involved in administering the estate, it was entitled to a fee of approximately $20,000 pursuant to Ark. Stat. Ann. § 62-2208 (d) (Repl. 1971) rather than the $4,000 allowed. Under § 62-2208 (c), the court, in its discretion, may deny totally or reduce the compensation to a personal representative who has failed to file a satisfactory account or perform any other substantial duty pertaining to its office. Here the administration of the Arkansas estate was first begun in January, 1973, and the matter is still not resolved. It appears that this delay was primarily due to the appellant executor initiating the original probate in Mississippi in disregard of the advice of its Arkansas counsel. This has threatened the assets of the Arkansas estate to near total depletion. Accordingly, we find no abuse of the court's discretionary authority under § 62-2208 (c) in the allowance of only a $4,000 fee.

In regard to the $5,000 attorneys' fees awarded by the court, we cannot agree that the sum awarded was unreasonable or insufficient so as to constitute an abuse of discretion. Appellant

sought compensation for its current attorneys in the sum of approximately $17,000 using the statutory standard set out in § 62-2208 (d). However, the court, if it determines the schedule of fees to be excessive under the circumstances, is empowered to allow a fee commensurate with the value of legal services rendered. Appellant argues the fees allowed its current attorneys, Brick and Adams, for services they performed for the executor after April 15, 1976, were inadequate based upon any criteria. Appellees agree that the award was not commensurate with the value of the services rendered. However, they assert, as the trial court found, the bulk of the services were performed on behalf of the executor in its individual capacity to obtain credits for tax payments made out of the Arkansas assets of the estate. This action was actually in derogation of the interests of the appellees or residuary legatees. In the circumstances, we perceive no abuse of discretion in the award of $5,000 in fees. See *Jacoway v. Hall*, 67 Ark. 340, 55 S.W. 12 (1900).

Appellees, by cross-appeal, assert the court erred in failing to charge the executor with the decrease in value of 1,560 shares of stock held during the preceding four year period of the administration of the estate. Appellees argue that the stock had decreased in value in the amount of approximately $35,000 or one-half since the time distribution should have been made and that the delay in distribution is solely attributable to appellant's negligence. The trial court determined the appellees were partially responsible for this decrease in value and denied the requested relief and we agree. The officials of appellant First National had consulted with the appellees, the residuary legatees, concerning this stock. They gave their written authorization to sell one-half of the stock to cover potential federal, Mississippi and Arkansas estate taxes, liabilities and expenses. Also discussions were held as to the necessity of retaining the rest of the stock without making distribution. Additionally, appellant discussed with appellees' attorney the problems of tax allocation and the effect on ultimate distribution.

Neither the appellees nor their attorney requested a distribution at any time or any other action regarding the balance of the stock. Certainly, we cannot say that the court's finding that appellees were partially responsible for the stock's decrease in value is against the preponderance of the evidence.

Affirmed on direct.

Affirmed on cross-appeal.

We agree: Harris, C.J., and Fogleman and Byrd, JJ.

APPENDIX 2

Affirmance

Probate District

State of Arkansas
In the Supreme Court } Sct.

Be It Remembered, That at a term of the Supreme Court of the State of Arkansas, begun and held at the Court House, in the City of Little Rock, on the 3rd day, being the first Monday of October A.D. 1977, amongst others, were the following proceedings, to-wit: On the 24th day of April A.D. 1978 a day of said term:

First National Bank of Memphis,
Executor,
Appellant,
v.
(Illegible)
Louise Crumm Smith et al.,
Appellee.

} Appeal from Crittenden Probate Court ..... District

This Cause came on to be heard upon the transcript of the record of the Chancery Court of Crittenden County, ... Distrcit, and was argued by solicitors, on consideration whereof it is the opinion of the Court that there is no error in the proceedings and decree of said Chancery Court in this cause.

It Is Therefore Ordered and Decreed by the Court that the decree of said Chancery Court in this cause be and the same is hereby in all things affirmed with costs.

It Is Further Ordered and Decreed that said appellee ..... recover of said appellant ..... all their costs in this Court in this cause expended, and have execution thereof.

In Testimony, That the above is a true copy of the decree of said Supreme Court, rendered in the case therein stated, I, Jimmy H. Hawkins, Clerk of said Supreme Court, hereunto set my hand and affix the Seal of said Supreme Court, at my office in the City of Little Rock, this 11th day of May A.D. 1978.

JIMMY H. HAWKINS
Clerk

DENA L. WILLIAMS
D. C.

APPENDIX 3

In the Probate Court of Crittenden County, Arkansas

In the Matter of:

The Estate of Lula S. Torian, Deceased — No. 3556

Order Denying Specific Credits of Accounting

Now on this 22nd day of November, 1976, the matter comes on to be heard. The executor appears by its duly authorized representative, Robert P. Blumenthal, and two of its attorneys, Ben Adams and Jake Brick. The object legatees appear by two of their attorneys, John Porter and Elton A. Rieves, III. Whereupon, this matter is submitted to the Court upon the accounting filed herein, the objections and amendments thereto, the responses of the executor to said objections, as amended, briefs submitted by all parties, argument of counsel, testimony of the witnesses, together with exhibits introduced into evidence, the entire record herein and other matters, things and proof before the Court, from all of which the Court doth find:

1. That this matter was originally set for trial on August 20, 1976. That at such time, the Court observed that the decedent's next of kin and the beneficiaries under the Last Will and Testament of the decedent had not been notified of the appointment of the executor and had not been given notice of the inventory and accounting filed in this cause. That at such time the Court continued the hearing until September 27, 1976, and directed that the executor give the proper notices in accordance with law. That such notices were given to all interested persons, and at the time this matter was heard

on September 27, 1976, all interested persons had been duly notified, in writing, pursuant to law.

2. That at the conclusion of the evidence on September 27, 1976, this hearing was continued until this date.

3. That the Court's ruling is contained in a written memorandum opinion filed, or to be filed in this cause, a copy of which is attached hereto and made a part hereof as though fully set out herein word for word.

IT IS THEREFORE BY THE COURT CONSIDERED, ORDERED AND ADJUDGED that:

1. Specific credits contained in the accounting, as itemized in the memorandum brief, totaling $229,114.34, be and the same are hereby denied.

2. The matter of executor and attorneys' fees are reserved for future order.

3. The executor be and it hereby is directed to submit to the Court, within twenty days from November 22, 1976, its plan for disbursement of this estate.

4. The executor be and it hereby is directed not to remove or transfer any part of this estate to the state of Mississippi without prior order of this court.

5. The prayer for interest made by the objecting legatees is denied.

Entered this 24th day of November, 1976.

HENRY WILSON
Probate Judge

Estate of Lula S. Torian, deceased.
Crittenden Probate No. 3556

Memorandum Opinion:

Lula B. Torian, a resident of 1929 AcAuley Drive South, West Memphis, Arkansas, died in said city October 24, 1972, leaving as her last will and testament a written instrument dated February 17, 1970, a codicil thereto dated March 26, 1970, and a second codicil thereto dated January 27, 1971.

All instruments declared and set forth decedent's residence in West Memphis, Arkansas, were witnessed by Joel P. Walker, an attorney at Hernando, Mississippi, and the first codicil directed First National Bank of Memphis, Memphis, Tennessee (hereinafter referred to as First National) serve as executor of her estate, and that said executor use Mr. Walker's law firm as attorneys for the estate.

First National is a large financial institution, with a trust department of over two hundred employees, which contends it is capable, competent and qualified to efficiently serve as personal representative for estates in the Memphis area, including the administration of estates in the States of Arkansas and Mississippi. That said First National is, and for the purpose of this proceeding, charged with full and complete knowledge of the Probate Laws of Arkansas and Mississippi, the effect thereof, its duty thereunder and responsibility to comply therewith.

That on November 3, 1972, on petition of First National said will and codicils were admitted to probate in the Chancery Court of DeSoto County, Mississippi, with said First National being appointed as executor of that part of decedent's estate in Mississippi.

Sec. 62-2104 Ark. Stats. sets forth the powers granted by Arkansas to a niminated executor prior to appointment, one of

which is to "take such steps as are reasonably necessary in manage- and preservation of the property and rights of the decedent."

On January 23, 1972, again on petition of First National, authenticated copies of said will and codicils, duly proven, were admitted to probate in the Probate Court of Crittenden County, Arkansas, with First National being appointed as executor of this, the domicilary Arkansas estate of Mrs. Torian. A will may be admitted to probate in Arkansas although it may be "without the state". Ark. Stats. 62-2106.

At this point in time January 23, 1972, there were two *separate and independent* (and I emphasize separate and independent) probate proceeding, with First National serving as executor of each. The proceeding in Mississippi related to and could only be an administration of that part of decedent's estate in Mississippi. The Arkansas proceeding being the domiciliary administration, related to and did constitute the administration of the balance of decedent's estate outside of Mississippi, including intangible personalty located in Arkansas and Tennessee. This was set at $486,000.00 by First National in its initial petition for an Arkansas administration, and is shown to be $636,977.58 in the accounting filed herein June 7, 1976. The Arkansas estate tax return filed by First National reflects an Arkansas estate of $505,102.25.

On May 9, 1973, First National, without notice to any interested party, filed in this Arkansas proceeding its petition and secured an order to delay filing an inventory.

No further action was had in the Arkansas administration of Mrs. Torian's estate until April 15, 1976 (a period of almost three years), when a petition for an order to require the filing of an inventory and accounting and to proceed with distribution was filed. Pursuant to the order entered on said petition, First National filed its inventory, showing that as of June 2,

1976, it, as executor of the Arkansas estate, had received into its hands assets of said estate amounting to $495,626.29, and on the same day filed an accounting for the period from October 24, 1972, until April 30, 1976, showing it had received a total of $636,977.58, had paid $10,000.00 to a distributee and that it seeks credit for $425,416.34 paid to others than distributees. It should be noted here that First National did not include in such Arkansas inventory or accounting, any part of Mrs. Torian's estate in the State of Mississippi.

The $425,416.34 of expenditures First National now seeks approval of was paid during the period November 10, 1972, until April 12, 1976. No claim was filed, no authorization sought and no order entered in this court for any of such payments. A great number of the payments set forth in First National's accounting for the Arkansas estate are clearly improper, many relate only to the Mississippi proceeding, and some are not adequately documented.

Section 62-2613, Ark. Stats. provides that "all payments made by the personal representative without order of Court shall be at his own peril."

First National asserts that these expenditures were proper because they were made pursuant to decrees entered in the Mississippi administration of decedent's estate by the Chancery Court of DeSoto County. It is charged that the residuary beneficiaries were parties to the proceedings in Mississippi, that the Mississippi Court's decision is entitled to full faith and credit, and that the question of the propriety of such expenditures is res adjudicata by reason of such Mississippi decrees.

The Mississippi hearing began upon First National, previously appointed as Mississippi executor, on July 26, 1973, filing with the Mississippi Court, its petition to withdraw the original will and codicils. Residuary beneficiaries were named as respondents to such action and they filed answer agreeing to and seek-

ing such withdrawal. Other respondents, devisees of the principal Mississippi real estate, objected to such withdrawal and filed a Cross-Bill to require the executor in Mississippi to pay Federal Estate taxes on the Mississippi lands. To this Cross-Bill First National, as the Mississippi executor of Mrs. Torian's estate filed answer. There is nothing in the record to show that the residuary beneficiaries of Mrs. Torian's will were ever served with or waived process on the Cross-Bill. I only comment on this in passing, for I do not believe it of importance to a decision here.

First National as executor of Mrs. Torian's Arkansas estate was not a party to the Mississippi proceeding and therefore, neither such executor or said estate are subject to decisions of the Mississippi Courts. Such decisions can only extend to the extent of Mrs. Torian's Mississippi estate, being administered by the Mississippi executor. Any decision of the Mississippi Court, rendered in a proceeding to which Mrs. Torian's Arkansas estate was not a party, providing for payment of claims and expenses from and directing disposition of such Arkansas estate is clearly beyond the jurisdiction and power of the Mississippi Courts, a nullity and void. To the extent that the Mississippi decrees are directed to First National as executor of Mrs. Torian's Mississippi estate and relate to property of the estate within the State of Mississippi, they will be given full faith and credit by this court.

On January 25, 1974, First National as executor of Mrs. Torian's Mississippi estate, filed its petition in the Chancery Court of DeSoto County for authority to pay Federal Estate tax. On January 25, 1974 and February 4, 1974, a decree and an amended decree was entered by said Mississippi Court, authorizing First National as executor "in this cause" to proceed with payment of Federal Estate Tax "out of assets held by the (Mississippi) Executor." The word Mississippi must be read into the order.

On March 26, 1974, the Mississippi Court denied First National's petition as Mississippi executor to withdraw the original will and codicils, entered an order construing the will and directed First National as the Mississippi executor to proceed accordingly in the administration and distribution of "said estate". "Said estate" could only refer to that part of decedent's estate in Mississippi. The executor of the Arkansas domiciliary estate was and is not subject to such order, and this court is not required to give full faith and credit to it as an order against the Arkansas estate.

A large part of the expenditures for which First National as Arkansas executor, requests approval by this court, are payments for Federal and Mississippi Estate Tax.

Section 63-150 Ark. Stats. sets forth the policy and law of the State of Arkansas and provides for spread of the burden of State and Federal Estate, Death and Inheritance Taxes proportionately among the distributees and/or beneficiaries of the estate. This court is bound to uphold such policy and follow Arkansas law in the administration of an admittedly Arkansas estate.

The petition of First National for approval of its accounting filed herein, will to the extent of the following specific credits sought, be denied:

1973		
7/6	192752	$150.00
7.23	193607	325.00
12/10	201678	6.12
1974		
1/15	203811	40.00

1975			
1/9	336583		50.00
6/30	237412	Denied in amount of	77,257.85
11/25	245732		12,697.86
11/25	245731	Denied in amount of	76,406.60
1976			
4/9	254654	Denied in amount of	51,188.24
4/12	254752		10,992.67

Reductions of credits sought for payment of Federal Estate Taxes have been in the amount of 58.98 percent, the amount the Mississippi estate bears to Mrs. Torian's total estate.

At this time, it appears to this court that First National is relegated to proceeding in Mississippi, to recover for advances made by the Mississippi executor to the Mississippi estate. Of course this is only of academic interest as this court has no control or interest in the Mississippi proceedings.

I could comment at great length upon the administration of this estate, however it would be of little benefit at this time. First National, if not sadder, should be a wiser institution.

The question of executor and attorneys fees are reserved for future order. The executor is directed to submit within twenty days, its plan for disbursement of this Arkansas estate.

No part of this estate shall be removed or transferred to the State of Mississippi without prior order of this Court.

A precedent pursuant to the foregoing opinion shall be submitted.

APPENDIX 4

In the Supreme Court of Mississippi

No. 48,377

In Re Estate of Lula S. Torian:
Ralph Crum, et al.

v.

First National Bank of Memphis, Executor and Dorothy Hope Sullivan, et al.

Before Patterson, Inzer, and Walker

Inzer, Justice, for the Court:

This is an appeal by Ralph Crum and others, the residuary legatees of the will of Lula S. Torian, from a decree of the Chancery Court of DeSoto County denying the petition of the executor to withdraw the original will and to transfer jurisdiction to the state of the domicile of the deceased, and from an adjudication that the estate tax is to be paid out of the residue of the estate. We affirm.

Mrs. Lula B. Sullivan Torian died on October 24, 1972, leaving a last will and testament executed on February 17, 1970, and two codicils, one dated March 26, 1970, and the other dated January 27, 1971. The will and codicils were executed in DeSoto County. The codicil dated March 26, 1970, appointed the First National Bank of Memphis as executor and directed that the executor use the law firm to which Joel Walker belonged in Hernando, Mississippi, as attorneys for the executor because of his long association with the family.

At the time of her death and at the time the wills and codicils were executed, Mrs. Torian's legal domicile was in West Memphis, Arkansas. After her death, the executor filed a petition to probate the original will in DeSoto County. The petition alleged that the testatrix was a resident of Arkansas, that at the time of her death she owned no real property in Arkansas, and that she owned approximately 900 acres of land in DeSoto County, and that the probate of the will in DeSoto County, Mississippi, where the bulk of her estate was situated was necessary and desirable. On November 3, 1972, an order was entered admitting the will to probate and appointing the First National Bank of Memphis executor without bond. The executor qualified and letters testamentary were issued to it. Notice to creditors was published as required by law.

Clause I of the will as amended by the second codicil dated January 27, 1971, devised to Mrs. Torian's husband and the nine appellants herein all of her stock in Schlering-Plough Corporation to be shared equally. Clause II of the will devised to Ralph Crum, one of the appellants herein, nine or ten acres of land in DeSoto County, known as part of the "Old Cheatum Place." Clause III of the will bequeathed to her husband H. G. Torian $10,000 cash. Clause IV of the will devised $200 to the Methodist Children's Home in Jackson, and $2,000 to the Methodist Hospital in Memphis.

Clause V of the will devised to Dorothy Hope Sullivan, Robert Lamb Sullivan, David Sullivan and Warren Ware Sullivan all the remainder of decedent's land in DeSoto County consisting of 920 acres to be shared equally.

In Clause VII the testatrix provided that all the rest, residue and remainder, including any lapsed legacies in cash that she had left, was devised and bequeathed to the appellants, share and share alike.

On July 26, 1973, the executor filed a petition styled "Petition of Executor for Permission to Withdraw Original Will."

The executor alleged that an authenticated copy of the will of Mrs. Torian had been probated in the Probate Court of Crittenden County, Arkansas, and that the bank had been appointed executor by the Arkansas Court. However, the executor alleged that there was some question about the validity of probate of the authentic copy of the will executed by a resident of Arkansas and that no authority appeared to exist to probate a copy of an original will of a resident of Arkansas.

The reasons given in the petition for the request that the original will be transferred to Arkansas was that decedent's will and codicil both stated that she was a resident of Arkansas, that at the time of her death she was married to Mr. Torian who was and still is a resident of Arkansas and that she died in Arkansas. Furthermore, the testatrix and her husband resided on property in West Memphis, Arkansas, to which reference was made in her will. All parties in interest were made parties defendant to the petition and process was issued for them.

The appellants, who are the residuary legatees, answered and joined in the prayer of the executor to be allowed to withdraw the original will so that it could be probated in Arkansas.

The appellees, all residents of Mississippi, to whom the 920 acres of land in DeSoto County was devised, answered the petition and denied that Mrs. Torian owned any land in Crittenden County, Arkansas, that was subject to probate. Appellees further alleged that the value of her personal estate in Arkansas was less than $3,000 and that under the laws of Arkansas no administration of the estate was necessary. The answer alleged that the probate of the original will in DeSoto County was proper and that Section 509, Mississippi Code 1942 Annotated, prohibited the withdrawal of the original will after probate in Mississippi. The answer was made a cross-bill against the executor and alleged that the estate of Mrs. Torian was of such size that payment of federal estate taxes was required; that such taxes had not been paid; and that the non-payment of such taxes

unnecessarily encumbered the title to the cross-respondents to the land devised to them. Cross-petitioners prayed that the executor be required to pay the proper estate taxes and to allocate the burden of such taxes as required by the laws of the State of Mississippi.

In answer to the cross-bill, the executor and appellants admitted that the estate would owe federal estate taxes, but alleged that a controversy existed between the beneficiaries of the estate as to the domicile of the decedent and the related question of which state's law should determine the proration of such taxes. The executor contended that since the decedent was a resident of Arkansas, the liability of the parties for the payment of the estate taxes should be determined by the probate court of the county in which the decedent was domiciled at the time of her death.

The pleadings raised two issues: one, whether the executor should be allowed to withdraw the original will in order that it would be probated in Arkansas; and two, if not so allowed to withdraw the original will, whether the Mississippi law or Arkansas law should be applied as to the payment of federal estate taxes.

The testimony reveals that Mrs. Torian, prior to her marriage to Mr. Torian in 1960, had lived in DeSoto County for many years. She was a good business woman and was successful in operating her farming interests. She did her banking with the First National Bank in Memphis. At the time she married Mr. Torian she was 79 years of age. It was her first marriage and Mr. Torian was a widower who had retired. He evidently was a man of modest means and maintained a small residence in West Memphis, Arkansas.

After her marriage she lived with her husband in West Memphis, but continued to maintain her large home in DeSoto County and kept it staffed with two servants. Electrical and telephone

service continued in the home, and some clothing and food were kept there. She also kept some of her jewelry in a safe. Until the last year before her death, Mrs. Torian came to Mississippi every week or two and would stay a day or two at a time and on occasions stayed much longer. She continued to supervise her farming interests, to keep her membership in the Methodist Church at Walls, Mississippi and to vote in Mississippi, she last voted in the two primaries and the general election in 1971. After her marriage, Mrs. Torian continued to refer to DeSoto County as her home.

At the time of her death, the only real property Mrs. Torian owned in Arkansas was an interest in the home in which she and Mr. Torian resided. The title to the property was in both parties as an estate in entirety and it passed to Mr. Torian by operation of law. She owned no personal property located in Arkansas except some personal effects and household furnishings valued less than $3,000.

Her bank accounts were all with Memphis banks and her stocks and bonds were in a lock box in the First National Bank of Memphis. After her death and after the will was probated in Mississippi, the executor took charge of these assets amounting to approximately $486,000.

The Chancellor found that in view of the express provisions of Section 91-7-33, Mississippi Code 1972 Annotated, the original will was properly probated in DeSoto County, Mississippi, and that by virtue of Section 91-7-31, the original will could not be withdrawn from the clerk's office.

The chancellor further found that by virtue of her being married and living with her husband whose domicile was in Arkansas, the testatrix was legally domiciled in Arkansas at the time of her death, but in her own mind, her home and only home was in Mississippi. In the chancellor's opinion he stated that he found from the evidence that Mrs. Torian intended for

her estate to be wound up in accordance with Mississippi law. As we construe his opinion, we determine that for that and other reasons, the chancellor found that the contacts of the forum state were of greater significance than those of the domiciliary state.

A decree was entered dismissing the petition to transfer jurisdiction to the probate court in Arkansas and directing that the estate taxes and all other liabilities of the estate, including administration expenses, be paid from the residuary estate.

On appeal, appellants argue two points for reversal of this case. Point I is as follows: Although the Mississippi court had jurisdiction to admit the will of the non-resident testatrix to probate, nevertheless, since the executor probated the will in this state by mistake and thereafter sought to withdraw the will to present it for probate in Arkansas, the domiciliary state, the Mississippi court as a matter of comity should have declined jurisdiction or deferred to the courts of the domiciliary state on the issue of which parties should bear the burden of estate taxes. Point II is as follows: Having assumed jurisdiction the Mississippi court should have applied the law of Arkansas to determine which parties should bear the burden of estate taxes, absent a clearly expressed intent to the contrary. The law of the state of the domicile governs that determination. Arkansas law compelled the apportionment of such taxes.

We find no merit in either of these arguments. As to Point I it is clear from the record that the will was not probated in Mississippi by mistake. In fact, the petition to withdraw the original will and transfer jurisdiction to Arkansas does not allege that the will was probated in Mississippi by mistake. Neither is there any proof that the will was probated in Mississippi through mistake. The only testimony even tending to show a mistake was the testimony of Mr. Blumenthal, the present trust officer of the bank, who drew a conclusion on behalf of the bank that it was a mistake to offer the will for original probate in

Mississippi when the testatrix was domiciled in Arkansas at the time of her death. However, Mr. Blumenthal was careful to point out that he was not the trust officer at the time the will was probated in Mississippi and that he had no idea as to what prompted the bank to offer the will for probate in Mississippi instead of Arkansas. He then said:

> All I can say is that we found ourselves in this present situation. We found an ambiguity of tax law and in attempting to clarify what we should do we sought the best way to bring it to the Court's attention. I don't believe that we have made any intentional mistakes or any mistakes otherwise.

The chancellor correctly held by virtue of the provisions of Section 97-7-33 the original will was properly probated in Mississippi in the first instance. The chancellor also correctly held that since the original will was probated in this state Section 91-7-31, prohibited withdrawal of the original will.

Having assumed jurisdiction, the Mississippi court was not required by comity to defer to the courts of the domiciliary state on the issue of which of the parties should bear the burden of the estate taxes. To have done so would have been contrary to the public policy of this state announced by our statutes and decisions of this Court.

The forerunner of Section 91-7-33, supra, was construed in *Carroll v. McPike*, 53 Miss. 569 (Br. & Hem. 1876):

> The general doctrine, as declared by Story, in Conflict of Laws, § 518, is that an administration in any other country than that of the domicile of the deceased is treated as in its nature ancillary merely to that in the country of the domicile, because "the final distribution of his effects among his heirs or distributees is to be decided by the law of his domicile." This reason wholly fails in its application to this State, and the doctrine built on it is en-

tirely subverted by our statute, declaring that personal property situated in this State shall descend and be distributed according to the laws of this State, notwithstanding the domicile of deceased may have been in another State. Code; § 1950. In this State administration of the effects here of a deceased person, no matter where his domicile was, is independent of all other administrations, and to be conducted in all respects as if the decedent had been a citizen of this State, when he died. Debts are to be paid according to the assets and any surplus is to be distributed here. All creditors, no matter where residing, nor where the debts were contracted, are entitled to prove their claims here, and proceed in our courts to enforce them, and to share in the assets here.

(53 Miss. at 576, 577).

Bolton v. Barnett, 131 Miss. 821, 95 So. 721 (1923), involved the will of Mrs. Bolton who resided with her husband in Memphis, Tennessee, at the time of her death. She had lived until a few years before her death in Prentiss County, Mississippi. She owned a home and some small amount of personal property in Mississippi, and after her death, her original will was probated in the Chancery Court of Prentiss County, where the property was situated. The question was raised as to whether the Chancery Court of Prentiss County had jurisdiction, and this Court pointed out that under the provisions of Section 2004, Code of 1906, now Section 91-7-33, Mississippi Code 1972 Annotated, the original will could be proven and admitted to probate in the first instance in Mississippi, and that the Chancery Court of Prentiss County had jurisdiction to admit the will to probate and to construe it. A question was also raised as to the right of the husband of the testatrix to renounce the will, since under the law of Tennessee, the domicile of the deceased, the husband had no right to renounce the will. In answer to this contention, this Court stated:

Because of our present laws, in some ways peculiar, with reference to personal property, and especially so because of the special permission to originally probate a foreign will here, these probates and administrations are now original, and in no way ancillary to the probate at the domicile of the testator.

Since the original will may be probated here, it follows as a matter of right and justice that it may be renounced here in accordance with our statute upon renunciation. The Garland case, supra, says the right of renunciation is available only in the proper tribunal of the testatrix's domicile because it is an incident to the jurisdiction of the tribunal which has exclusive power to admit the will to probate, and proceeds from the jurisdiction over the matter to probate. *Under our present law our court has the jurisdiction to admit the will to probate in the first instance, and therefore, the right of renunciation pertains to this tribunal. We neither look to the state of the domicile of the testator for the power to renounce nor to the share to be taken upon the renouncing of the will either of the real estate or the personal estate situated here, but look to our own laws for both because of the original probate of the will here.* Under our laws the husband has the right to renounce the will. This statute does not give the right of renunciation to only citizens of this state, but gives it to any husband or wife upon the probate of the will of the deceased. (Emphasis added). 131 Miss. at 826, 827, 95 So. at 726.

As to the payment of debts and expenses of administration of the estate the pertinent part of Section 91-7-91, provides:

The goods, chattels, personal estate, choses in action, and money of the deceased, or which may have accrued to his estate after his death from the sale of property, real, personal or otherwise, and the rent of lands accruing dur-

> ing the year of his death, whether he died testate or intestate, shall be assets and shall stand charegable with all the just debts, funeral expenses of the deceased, and the expenses of settling the estate. The lands of the testator or intestate shall also stand chargeable for the debts and such expenses over and above what the personal estate may be sufficient to pay, and may be subjected thereto in the manner hereinafter directed.

It is clear from this statute and the decisions of this Court that in the absence of a contrary provision in a will, resort must first be had to the personal property in the payment of debts and expenses of the estate including federal estate taxes, before resort may be had to real property. It is also clear that resort must be first had to personal property not specifically devised by the will. Temple v. First National Bank of Meridian, 202 Miss. 92, 30 So. 2d 605 (1947); Gaines v. Klien, 203 Miss. 271, 34 So. 2d 489 (1949); and Riegelhaupt v. Ostroffsky, 237 Miss. 521, 115 So. 2d 331 (1959).

Appellants cite numerous cases from other jurisdictions which hold that the apportionment of federal estate taxes when a decedent owns property in several states should be determined by the law of the decedent's domicile. Appellants rely heavily on *Mazza v. Mazza*, 475 F. 2d 385 (D. C. Cir. 1973), in support of their argument that the law of the decedent's domicile should control. In *Mazza*, the decedent was domiciled in Maryland and his will was probated in Maryland. Maryland also had a statute providing for apportionment of federal estate taxes. After his widow paid the estate taxes she sued in the District of Columbia seeking contribution from decedent's sister, who inherited by operation of law some of the property located in the District. Although the District of Columbia did not have an apportionment statute, the federal court declared that the law of Maryland should apply in such a case. However, that court did not arbitrarily apply the rule of decedent's domicile,

but held that Maryland's law should apply under the "interest analysis approach." Maryland clearly had a greater interest in the controversy, and the court stated:

> The relevant inquiry focuses on the relationship of the two jurisdictions to the controversy, the interest involved and whether the application of the foreign law would offend a strong and clearly defined local policy. (475 F. 2d at 391).

In the case before us, the forum state, Mississippi, and not the domiciliary state, Arkansas, had the greater substantial interest in this controversy. The application of the Arkansas statute would not serve the State of Arkansas or any citizen thereof. The propery in Arkansas went to decedent's husband and is unaffected by the Arkansas apportionment statute which provides that no such taxes shall be apportioned against the surviving spouse with respect to property received by such spouse, the value of which is deductible for federal estate tax purposes. Thus, the only interest that the State of Arkansas has in this litigation is the fact that the domicile of the decedent was in Arkansas at the time of her death. On the other hand, the situs of the real property involved is in Mississippi, and the specific devisees to be affected are residents of Mississippi. The residuary legatees are residents of Tennessee. The personal property which decedent left was all located in the State of Tennessee at the time of her death and is now in the hands of the executor and subject to the Chancery Court of DeSoto County, Mississippi. We held in *Mitchell v. Craft*, 211 So. 2d 509 (Miss. 1968), that a case is to be governed by the law of the forum unless it is expressly shown that a different law applies, and that in case of doubt, we will naturally prefer the laws of our own state. Here, Mississippi has the dominant interest and applying the "interest analysis approach," the court correctly held that the Mississippi law would apply. Furthermore, to apply the Arkansas apportionment statute, would be repugnant to the public policy of this state.

We hold that the chancellor was correct in holding that the estate taxes should be paid according to Mississippi law. The executor was under no compulsion to probate the will in Mississippi and having submitted itself to the jurisdiction of the Chancery Court of DeSoto County and collecting the assets pursuant to Letters Testamentary granted in DeSoto County, Mississippi, the estate taxes and other debts of the estate must be paid in accordance with the Mississippi law.

For the reasons stated, the decree of the Chancery Court of DeSoto County must be and is affirmed.

Affirmed.

Gillespie, C. J., and Rodgers, P. J., and Smith, Robertson, Sugg and Broom, J. J., Concur.

APPENDIX 5

In the Chancery Court of DeSoto County, Mississippi

First National Bank of Memphis, Executor of Estate of Lula S. Torian, Deceased.	No. 72-497

MEMORANDUM OPINION

The court has reached the following conclusions:

1. In view of the express provision of Section 91-7-33 of the Mississippi Code of 1972 the original will was properly admitted to probate in Mississippi since the testatrix owned property in Mississippi.

2. The exception set out in Section 91-7-31 of the code is the only circumstance under which an original will may be removed from the clerk's office. The present situation does not come within that exception.

3. As a result of her being married to and living with a husband whose domicile was in Arkansas, the testatrix was, in legal contemplation, domiciled in Arkansas at the time of her death.

4. In her own mind, however, the testatrix' home, and her only home, was in Mississippi. The evidence before the court makes that conclusion inescapable. And the conclusion is equally inescapable that she intended for her estate to be "wound up" in accordance with Mississippi law—that is, with the death taxes being payable out of the residuary along with

the other liabilities of her estate. Any other conclusion would impute to her an intention, for instance, that her bequest of "$200.00 cash" to John Henry should be reduced by his proportionate part of the death taxes—and that is unthinkable. Furthermore, she must have realized that, while her debts were nil and her cash bequests totaled only $13,400.00, the death taxes would be considerable in amount and would probably exhaust her cash assets. Otherwise there would be no reason for her to use, in the residuary bequest, the phrase "any cash that I may have left". It cannot reasonably be concluded that the testatrix feared that her cash bequests and debts would exhaust all of her bank accounts, savings accounts, bonds and other cash-type assets.

From the foregoing it follows that it was the testatrix' intention that the death taxes be paid out of the residuary, and her will should be so construed.

A decree embodying these conclusions may be submitted—with all court costs being assessed against the estate.

March 13, 1974.

HERBERT M. PAUL
Chancellor

Original to the Clerk for filing.

Copies to: Mr. Joel P. Walker, Attorney
Hernando, Mississippi 38632
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1910 First National Bank Building
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In the Chancery Court of DeSoto County, Mississippi

First National Bank of Memphis, Executor
of
Estate of Lula S. Torian, Deceased. } No. 72-497

Final Decree

This Cause having been submitted to the Court on pleadings, oral and documentary evidence, and briefs of counsel, and the Court having concluded (for the reasons set forth in its Memorandum Opinion dated March 13, 1974) that the Executor's Petition for Permission to Withdraw the Original Will of Lula S. Torian, Deceased, should be denied and that the cross-petitioners (Dorothy Hope Sullivan, Robert Lamb Sullivan, Warren Ware Sullivan, Mrs. Mary Sullivan and David Sullivan) are entitled to have the decedent's will construed as hereinafter set forth.

It Is, Therefore, Hereby Ordered, Adjudged and Decreed:

1) That the aforesaid Petition be and the same is hereby denied and dismissed without relief and with prejudice;

2) That the decedent's will be and the same is hereby construed so as to require the payment from the residuary estate of all estate taxes, all other liabilities of the estate and all administration expense; and that the Executor be and it is hereby authorized and directed to proceed accordingly in the administration and distribution of said estate.

Ordered, Adjudged and Decreed this 26th day of March, 1974.

HERBERT M. PAUL
Chancellor

APPENDIX 6

Article IV.—States—Reciprocal Relationship Between States and With United States

Section 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

APPENDIX 7

Title 28, U.S.C. § 1738. State and Territorial Statutes and Judicial Proceedings; Full Faith and Credit

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken. June 25, 1948, c. 646, 62 Stat. 947.

APPENDIX 8

Title 63, Arkansas Statutes Annotated, Section 150

63-150. Tax to Be Spread Proportionately Among Distributees and Beneficiaries.—Except as otherwise directed by the decedent's will, the burden of any State and Federal Estate, Death, and Inheritance Taxes paid by the executor or administrator shall be spread proportionately among the distributees and/or beneficiaries of the estate, so that each shall bear his proportionate part of said burden; provided, however, that no such taxes shall be apportioned against the surviving spouse with respect to property received by such spouse the value of which is deductible for Federal Estate Tax purposes. [Acts 1943, No. 99, § 1, p. 142; 1955, No. 122, § 1, p. 292.]

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APPENDIX 9

In the Probate Court of Crittenden County, Arkansas

In the Matter of:
The Estate of Lula S. Torian, Deceased. } No. 3556

Response of Executor to Supplemental Memorandum of Authorities of Objecting Legatees

In response to the supplemental authorities recently submitted by the objecting legatees in this action, the Executor, First National Bank of Memphis, is of the opinion that a response should be made in order to clarify the significant issues to be decided by this Court.

The basic issue involved is whether the objecting legatees are entitled to a review before this Court of the judgment and ruling entered by the Mississippi Chancery Court which was affirmed by the Mississippi Supreme Court upon appeal by the same objecting legatees. Essentially the question involves the principle of res judicata and application of the Full Faith and Credit Clause of Article IV, Section 1 of the United States Constitution and 28 U.S.C.A. Section 1783. As a result, the judicial order of the Mississippi Supreme Court which determined that the law of Mississippi should apply in connection with the payment of Federal Estate taxes is entitled to be given full faith and credit by this court and the objecting legatees are estopped under the principle of res judicata from again attacking and raising these same issues.

Objecting legatees in their supplemental brief cite the Arkansas cases of *Simmons v. Simmons*, 203 Ark. 566, 158 S.W.2d

42 and *Hewitt v. Cox*, 55 Ark. 225, 15 S.W. 1026 which, unlike the present case, involve the issues of distribution of the assets of the estate to various legatees or beneficiaries. There is no doubt that the law of each state determines the disposition and transfer in an estate of title to property within the boundaries or control of the state. This is the very reason that it was necessary in the instant case to probate the Torian Will in the State of Mississippi. However, the issue before this Court is whether the objecting legatees can now collaterally attack the order of the Mississippi Supreme Court entered as a result of the appeal of the objecting legatees.

The case of *Selle v. Rapp*, 143 Ark. 192, 220 S.W. 662 is a case which, unlike the present case, involves the validity of the will itself under the laws of two states. It has not been asserted that the State of Arkansas does not have the authority to admit or refuse to admit a will to probate based upon Arkansas law regardless of whether the will was admitted to probate in a sister state under that state's law. Full faith and credit was not an issue in the *Selle* case because the New Jersey court's ruling did not address itself to the issue of whether the will was a valid will under Arkansas probate law nor did the New Jersey Court even purport to determine that issue of which it naturally did not have jurisdiction. However, in the instant case the objecting legatees voluntarily consented to the jurisdiction of the Chancery Court of Mississippi, answered and appeared in that proceeding, raised the same issues they seek to raise in this Court and furthermore appealed an adverse ruling to the Mississippi Supreme Court. Objecting legatees it should be pointed out did not seek any further review of the Mississippi Supreme Court's ruling.

The *Selle* case also indicates once again the necessity of probating the Torian Will in the State of Mississippi.

Objecting legatees cite the case of *Kinsey v. American Ore Corporation*, 203 Ark. 573, 158 S.W.2d 32 which holds, as

objecting legatees correctly state, that a Court must give full faith and credit to the judicial pronouncements of sister state when the court of the sister state had jurisdiction. Of course, the Mississippi Chancery Court had jurisdiction over the objecting legatees as a result of their appearance and participation in the Mississippi proceedings as well as the filing of their appeal to the Mississippi Supreme Court. As a result of their appearance and participation in a proceeding which involved the same issue they now raise before this Court, the principle of res judicata applies as well as the Constitutional pronouncement of full faith and credit. *Stacy v. Thrasher*, 47 U.S. 44, 12 L. Ed. 337; *Morris v. Jones*, 329 U.S. 545, 91 L. Ed. 488; *Durfee v. Duke*, 375 U.S. 106, 11 L.Ed. 2d 186; *May v. Anderson*, 345 U.S. 528, 97 L. Ed. 1221; *Pepper v. Bankers Life and Casualty Company*, 414 F.2d 356 (8th Cir., 1961); *Shulman v. Miller*, 191 F.Supp. 418 (D.C. Wisc., 1961) and *State v. Wright*, 109 S.W.2d 123 (Ark.).

Furthermore, the case of *Rice v. Metropolitan Life Insurance Company*, 238 S.W. 772, 152 Ark. 498, holds that a judgment rendered by a court of one state is conclusive in another state. Also, the case of *Christmas v. Russell*, 5 Wall. 290, 18 L. Ed. 475 states clearly that it is improper for a state to reexamine the judgment entered by another state in light of the Full Faith and Credit Clause of the United States Constitution.

Furthermore, Restatement of the Law (2) "Conflict of Laws", Section 317(3) states that:

> "A judgment in administration proceedings by a competent court of any state will be held conclusive in other states as to the issues determined upon all persons who are subject to the jurisdiction of the original court if the judgment is conclusive upon such persons in the state of rendition."

The comment to that statement points out that the rule stated is an application of the principles of res judicata and applies to

proceedings irrespective of whether they concern immovables or movables and that the rule is one of constitutional law. See also, *Roberts v. Bathhurst*, 112 F.2d 543 (5th Cir., 1940), Cert. den. 311 U.S. 769 (1940); and *Hodge v. First Presbyterian Church*, 338 U.S. 815 (1949).

The objecting legatees further cite certain Mississippi cases one of which is *Voyles v. Robinson*, 118 So. 420, which actually support Executor's position in this case. This case involved administrations, one in Georgia and the other in Mississippi in which each administration was handled by a different administrator. The Mississippi Court held that since the administrations involved two different administrators the Georgia judgment regarding claims against the estate were not binding upon the Mississippi administrator and that new proceedings in Mississippi against the Mississippi administrator would have to be conducted in order to recover against the Mississippi administrator. This case is not analagous or similar to the instant case where all parties were before the Mississippi Court and participated in those proceedings, but does indicate the significance of all parties having appeared in the Mississippi proceeding.

The case of *Buckingham Hotel Company v. Kimberly*, 103 So. 213, involves the issue of claims against an estate and considerations neither of which are present in the instant case. Contrary to objecting legatees conclusion, the cases cited do not involve the issue of full faith and credit and certainly do not stand for the proposition that the Court of one state is not bound by the judicial proceedings of a sister state involving identical parties and issues.

The instant case, as opposed to the cases cited by objecting legatees, does not involve construction of wills, satisfaction of claims against estates, disposition of realty or personalty or the effect of dual administrators. The instant case involves the issues of full faith and credit and res judicata as they apply to the Mississippi Supreme Court's decision involving proper allocation of the assets of the estate to pay federal estate taxes. This same issue was decided in *Mazza v. Mazza*, 475 F.2d 385 (D.C. Cir., 1973). As the Court pointed out in footnote 6 to that opinion, the issue of which law to apply concerning the allocation of federal estate tax payments should be decided by a court based upon which state has the greater interest in having its law applied. This is the same approach used by the Mississippi Supreme Court whereby the court determined that the State of Mississippi had the greater interest in applying its law especially in light of the fact that the objecting legatees were not residents of Arkansas, but residents of the State of Tennessee. The ruling of the Mississippi Supreme Court was primarily a conflict of law question in which the present objecting legatees participated and appeared. Likewise, the Executor, First National Bank of Memphis, was before the Mississippi Court, under its jurisdiction and bound to carry out the orders of the Mississippi Court and; therefore, since all parties were present and appeared in the Mississippi proceedings the objecting legatees are now barred and estopped from retrying the very issues decided by the Mississippi court. To allow the objecting legatees to seek another determination after the lawful processes of law in a sister state have been exhausted would defeat the basic and fundamental purpose of Article IV, Section 1 to the United States Constitution and the fundamental basis for the principle of res judicata.

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Certificate of Service

The undersigned does hereby certify that a copy of the foregoing has been served upon Elton A. Rieves, III, Attorney at Law, 210 Shoppingway Blvd., West Memphis, Arkansas 72301 and Mr. John S. Porter, Attorney at Law, 130 North Court Street, Memphis, Tennessee 38103, by placing a copy of same in the United States Mail, postage prepaid, this 24 day of Sept., 1976.

John C. Speer